FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 23 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 532

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, by JOSEPH E. McLEAN, Commissioner of Conservation and Economic Development,

Appellee.

MOTION TO DISMISS AND STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Appellee,
State House Annex,
Trenton, New Jersey.

BERNARD HELLRING,
Special Counsel,
1180 Raymond Boulevard,
Newark 2, New Jersey.

PHILIP LINDEMAN II,
On the Brief.

TABLE OF CONTENTS.

	PAGE
MOTION TO DISMISS	1
STATEMENT OF OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	1
PRELIMINARY STATEMENT	2
COUNTER-STATEMENT OF THE CASE	3
ARGUMENT:	
I. The questions raised do not present substantial federal questions	4
II. If federal questions have been raised at all, they have previously been decided by this court adversely to appellant	6
III.—The questions presented by appellant were decided on an adequate non-federal basis	8
IV.—The federal questions, if any, were not properly or timely raised below	11
CONCLUSION	12
Prayer for Relief Under 28 U. S. C. A., Sec. 2103	13

Table of Cases.

PAGE

Aero Mayflower Transit Co. v. *Board of R. R. Commissioners of Montana*, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947) 11

Black v. *Cutter Laboratories*, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 (1956) 11

Bowe v. *Scott*, 233 U. S. 658, 34 S. Ct. 769, 58 L. Ed. 1141 (1914) 12

Bragg v. *Weaver*, 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135 (1919) 7

Campbell v. *City of Olney*, 262 U. S. 352, 43 S. Ct. 559, 67 L. Ed. 1021 (1923) 11

Contributors to the Pennsylvania Hospital v. *City of Philadelphia*, 245 U. S. 20, 38 S. Ct. 35, 52 L. Ed. 124 (1917) 8

Equitable Life Assurance Society of the United States v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 47 L. Ed. 190 (1902) is apposite, where, at 187 U. S. pp. 311-312 ..... 7, 8

Hirb. v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945) 11

Joslin Mfg. Co. v. *Providence*, 262 U. S. 668, 67 L. Ed. 1167 (1923) 7

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770 (1928) 11

Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942) 5

Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939) 8

Rindge Company v. *County of Los Angeles*, 262 U. S. 700, 67 L. Ed. 1186 (1923) 7

Roe v. *Kansas ex rel. Smith*, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259 (1929) 11

PAGE

Sears v. *Akron*, 246 U. S. 242, 62 L. Ed. 689 (1918) 7
Southwestern Bell Telephone Co. v. *Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751 (1938) 5
State v. *Lanza*, 27 N. J. 516 (1958) 6
Thomas v. *Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. Ed. 782 (1908) 5
Tidal Oil Co. v. *Flanagan*, 263 U. S. 444, 445 S. Ct. 197, 68 L. Ed. 382 (1923) 8
United States v. *Carmack*, 329 U. S. 230, 91 L. Ed. 209 (1947) 7
United States v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 40 L. Ed. 576 (1896) 7
Whitney v. *California*, 274 U. S. 357, 47 S. Ct. 41, 71 L. Ed. 1095 (1927) 5
Williams v. *Kaiser*, 323 U. S. 47, 65 S. Ct. 363, 89 L. Ed. 398 (1945) 11

STATUTES.

Title 28 U. S. C. A., par. 1257(2) 2
Title 28 U. S. C. A., par. 1257(3) 2
Title 28 U. S. C. A. 2103 ..... 2, 13
United States Constitution:
Fourteenth Amendment 3, 4, 6, 7, 10, 11
New Jersey Constitution, 1947,
Article VIII, Sec. 2, Pars. 2, 3 ..... 9, 10
R. S. 58:20-3 N. J. S. A. 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No.

SILVIO A. LANZA,

Appellant,

vs.

STATE OF NEW JERSEY, by JOSEPH E. McLEAN, Commissioner of Conservation and Economic Development,

Appellee.

Motion to Dismiss.

Pursuant to Rule 16 of this court, Appellee hereby moves that the within appeal be dismissed on the grounds that it does not present a substantial federal question, that the federal question, if any, was not timely or properly raised, or expressly passed upon and that the judgment below rests on an adequate non-federal basis.

Statement of Opposition to Petition for Writ of Certiorari.

If the papers filed by appellant with this court be deemed to consitute a Petition for Writ of Certiorari appellee hereby opposes the same on the ground that they were not filed in accordance with Rule 21 of this court and that the New Jersey Supreme Court neither decided a federal question of substance not heretofore determined by this court nor decided any question in a way probably not in accordance with applicable decisions of this court.

Preliminary Statement.

On or about September 22, 1958, appellee was served with a paper entitled "Notice of Appeal to the Supreme Court of the United States" (Appellant's Statement as to Jurisdiction, pp. 62-65). Appellant stated therein (Appellant's Statement, etc., p. 63, l. 6) that the appeal "is taken pursuant to Title 25 U. S. C., par. 1257(2) and par. 1257(3)" (although appellant undoubtedly meant Title 28 U. S. C. A. etc.). Paragraph 1257(2) of Title 28 confers jurisdiction upon this court as to appeals from state courts wherein a state statute is drawn in question on the ground of its repugnancy to the Constitution, treaties or laws of the United States and the statute is upheld. Paragraph 1257(3) on the other hand confers jurisdiction upon this court to entertain Petitions for Writs of Certiorari under certain other circumstances. After having expressly invoked the certiorari paragraph, appellant proceeded to ignore Rules 21 subd. 1 and 23 subd. 2 of this court in that he failed to print, serve and file his briefs as required thereunder. Appellee urges that Title 28 U. S. C. A. 2103, permitting improvident appeals to be regarded as Petitions for Writs of Certiorari, should not apply in this case, in view of apellant's express invoking of Title 28 U. S. C. A. 1257(3), as aforesaid.

Assuming, however, that Title 28 U. S. C. A. 2103 is deemed to apply, appellee, nevertheless, submits that this court ought not to grant either the appeal or the Petition for Writ of Certiorari, and will address itself to both applications in this brief.

In the light of the foregoing confused application before this court on the part of appellant, appellee has both moved to dismiss the appeal and opposed the Petition for Writ of Certiorari.

Counter-Statement of the Case.

Appellant's Statement of the Case at pages 5 through 8 of his Statement as to Jurisdiction is generally accurate except for certain important and crucial factual errors.

In the first place, the complaint did not allege that which appellant reprinted at page 5 of his Statement. On the contrary, appellee filed and served an extensive complaint several pages in length. Appellant failed to make clear that he was merely paraphrasing the complaint. Be that as it may, the paraphrasing is, nevertheless, satisfactory for the purpose herein.

Secondly, the hearing at the trial level was in the *Superior* Court of New Jersey, Law Division, not the *Supreme* Court, Law Division (Appellant's Statement, etc., p. 6, l. 4). Next, the appellant did *not* demonstrate "that the Commissioner had arbitrarily acquired much more land than the State could use for a future water supply system. . . ." (Appellant's Statement, etc., p. 6, ll. 6-9). The appellant adduced no evidence whatever on this point and he was prevented from cross examining thereon, as he notes in his brief. (Appellant's Statement, etc., p. 6, ll. 16-32.)

Finally (although there are other minor errors), at page 7 of his Statement, commencing with the first full paragraph, appellant is not only argumentative, but he patently misstates the holding of the New Jersey Supreme Court below. That court did not find the provisions of the Round Valley Act to be "not repugnant to the Fourteenth Amendment to the United States Constitution", but rather that, as is clearly and unmistakably stated by Mr. Justice Heher for that court (Appellant's Statement, pp. 7-8 *passim*), under the Fourteenth Amendment to the Constitution, eminent domain is the power of the state to take lands for public use for which it must pay just compensation. No reference is made therein to the Round Valley Act itself.

Appellant fails to mention in his Statement of the Case that he did not specifically allege any repugnancy of the Round Valley Act to the United States Constitution until he moved before the New Jersey Supreme Court for a rehearing, which motion was denied by that Court without opinion. At page 5, lines 24-34 and page 6, lines 1-3, of his Statement as to Jurisdiction appellant states that his answer alleged certain deficiencies in the Round Valley Act and its application but he discloses that it is in the Third Separate Defense alone in which he alleges unconstitutionality of that act. Even there, however, he did not expressly allege that the Act was repugnant to the United States Constitution.

ARGUMENT.

I.

The questions raised do not present substantial federal questions.

Questions 1. and 2. (Appellant's Statement, etc., p. 3) generally ask if the Round Valley Act is not repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. Question 6. (Appellant's Statement, etc., p. 4) asks if the judgment of the ~~United States~~ New Jersey Supreme Court does not contravene the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. As to these, and also Questions 3, 4, 5, 7, 9, 10, and 11 (which are the rest of the appellant's Questions Presented) appellant has violated Rule 15, subd. 1(d) and Rule 23, subd. 1(f) of this court in that he has not specified the stage of the proceedings in the court of first instance, and in the appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised, and

the method of raising them. Appellant has stated only that his Third Separate Defense alleged the Round Valley Act to be unconstitutional. (Appellant's Statement, etc., p. 5, l. 31.) Indeed, appellant failed in any and all stages of the proceedings below to raise a federal question. He did not specify that the question of any other alleged invalidity or deficiency was raised as to the statutes, treaties or Constitution of the United States at any stage in the proceedings.

Even assuming, however, that the said reference to the Third Separate Defense implies repugnancy to the United States Constitution, that and the bare allegation that the other Questions mention the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution are not sufficient to invoke the jurisdiction of this court. For example, in *Thomas* v. *Iowa*, 209 U. S. 258, 28 S. Ct. 487, 52 L. Ed. 782 (1908) Mr. Justice Moody, for the court, said, at 209 U. S. page 263:

> "A mere claim in the court below that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution, [citing cases]."

It is well settled that appellant must show affirmatively from the record, not only that a federal question was presented in the court of highest jurisdiction below, but also that the decision of the federal question adversely to the appellant was necessary to the determination of the same. *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 58 S. Ct. 528, 82 L. Ed. 751 (1938); *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 41, 71 L. Ed. 1095 (1927); *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090 (1942). Appellant's quotation at page

7 of his Statement as to Jurisdiction, of a part of the opinion of Mr. Justice Heher in the New Jersey Supreme Court, *State* v. *Lanza*, 27 N. J. 516 (1958) does not show that a federal question, necessary to the determination of the cause, was raised below. In that excerpt, the court states only that the law of eminent domain and the requirement to pay just compensation for lands taken are the law of the land and that the Fourteenth Amendment to the United States Constitution operates to protect the rights of citizens in that regard. Appellant never denied the right of eminent domain to exist, nor did he allege that the Round Valley Act would deny him just compensation. Mr. Justice Heher's reference to the Fourteenth Amendment and to certain United States Supreme Court opinions is mere dictum and is intended only as background for his later holding that delegation of authority by the legislature to an administrative office to implement an acquisition of lands is valid under New Jersey authorities (Appellant's Statement, etc., Exhibit "A", p. 24, ll. 24-34).

II.

If federal questions have been raised at all, they have previously been decided by this court adversely to appellant.

Question 4. (Appellant's Statement, etc., p. 3) asks if the delegation of authority to the Commissioner of Conservation and Economic Development is not an unlawful delegation of legislative authority repugnant to the Fourteenth Amendment of the United States Constitution. Appellee urges that the presentation of this Question is as specious as it is irresponsible. Appellant obviously has undertaken no research into the authorities on this

point, for he cites no case to support him. Indeed, had he done so, he would have found the law to be squarely against him. Similarly, as to Question 5 (Appellant's Statement, etc., p. 3), the only question as to which "unconstitutionality" is alleged, appellant has no authority to support him. He inquires, in Question 5, whether or not the Round Valley Act violates the Fourteenth Amendment because he was not given an "opportunity to be heard". This court has previously decided many times that such delegation of authority by the Legislature is valid and that the property owner is not entitled to be heard (except, of course, as to the question of receipt of just compensation, which is not in issue herein). For example, in *Bragg* v. *Weaver*, 251 U. S. 57, 40 S. Ct. 62, 64 L. Ed. 135 (1919), this court held, at 251 U. S. p. 58:

> "When the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment [citing cases]."

See also, *Joslin Mfg. Co.* v. *Providence*, 262 U. S. 668, 67 L. Ed. 1167 (1923); *United States* v. *Carmack*, 329 U. S. 230, 91 L. Ed. 209 (1947); *Rindge Company* v. *County of Los Angeles*, 262 U. S. 700, 67 L. Ed. 1186 (1923); *Sears* v. *Akron*, 246 U. S. 242, 62 L. Ed. 689 (1918); *United States* v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 40 L. Ed. 576 (1896).

In that these questions have so frequently and exhaustively been decided by this court before, appellant may not assert them again in order to confer jurisdiction upon this court. To this effect, the opinion of *Equitable Life Assur-*

ance Society of the United States v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 47 L. Ed. 190 (1902) is apposite, where, at 187 U. S. p. 311 the court held:

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real substantive question on which the case may be made to turn,' that is, 'a real, and not a merely formal, Federal question is essential to the jurisdiction of this court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

See also *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia*, 245 U. S. 20, 38 S. Ct. 35, 52 L. Ed. 124 (1917); *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 445 S. Ct. 197, 68 L. Ed. 382 (1923); *Patterson* v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939).

III.

The questions presented by appellant were decided on an adequate non-federal basis.

As for Appellant's Questions 3, 9, 10, and 11 (Appellant's Statement, etc., pp. 3, 4 and 5), appellee submits that appellant imposes upon this court in asking it to consider them. They are questions exclusively within the fabric of New Jersey statutory and constitutional law and have no relevance in this proceeding whatever.

Question 3 concerns Article VIII, Sec. 2, Par. 3 of the New Jersey Constitution, 1947, which provides as follows:

> "The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, unless the same shall be authorized by a law for some single object or work distinctly specified therein. Regardless of any limitation relating to taxation in this Constitution, such law shall provide the ways and means, exclusive of loans, to pay the interest of such debt or liability as it falls due, and also to pay and discharge the principal thereof within thirty-five years from the time it is contracted; and the law shall not be repealed until such debt or liability and the interest thereon are fully paid and discharged. No such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. All money to be raised by the authority of such law shall be applied only to the specific object stated therein, and to the payment of the debt thereby created. This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God."

The New Jersey Supreme Court found the Round Valley Act not to violate said provision (Appellant's Statement, etc., Exhibit "A", pp. 16-20) and supported its opinion with New Jersey authorities alone. Appellant apparently

has ignored this question in the argument in his Statement as to Jurisdiction, for he has not mentioned it nor has he cited any authority to demonstrate the federal question.

Question 9 also refers to the New Jersey Constitution. It suggests that the Round Valley Act appropriated funds for the acquisition which were not certified by the Governor to be on hand, pursuant to New Jersey Constitution, 1947, Art. VIII, Sec. 2, Par. 2. In its opinion (reprinted at Appellant's Statement, etc., page 28 Exhibit "A") the highest court of New Jersey pointed out that appellant had not adduced any proof that the Governor had not certified the funds to be on hand and stated further that the appropriate Governor's budget message shows that the funds were in fact on hand. No federal question can remotely be contrived on this point.

Similarly, questions 10 and 11 dealing with the authority of counsel trying this case and the officer in whose name, on behalf of the State, the action is brought are purely state issues. The latter question was never raised in the proceedings below, nor does appellant attempt to show the same. His assertion, moreover, that it violates the 14th Amendment of the United States Constitution is not argued in his Statement as to Jurisdiction and is absurd. As for the authority of counsel to represent the state under R. S. 58:20-3 N. J. S. A., the absence of a federal question is also manifest, but in addition the New Jersey Supreme Court (Appellant's Statement, etc., Exhibit "A", pp. 27-28) found the authority valid although the issue was collateral to the case *at bar*. Only New Jersey authorities are cited by the court on this point.

With respect to Question 7 which suggests repugnancy to the 14th Amendment of the United States Constitution on the ground that the New Jersey courts had no right to strike appellant's answer and appoint Commissioners

because statutory authority had expired, this question, again, was not raised below. Also the applicability hereto of the federal Constitution in its entirety (much less to its 14th Amendment) is completely absent. Appellant has not, and cannot cite any authority for his position in this regard.

Appellee submits that this court is bound by the construction given by the New Jersey courts to its own statutes and to the validity of such statutes under the New Jersey Constitution. *Aero Mayflower Transit Co.* v. *Board of R. R. Commissioners of Montana*, 332 U. S. 495, 68 S. Ct. 167, 92 L. Ed. 99 (1947); *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770 (1928); *Campbell* v. *City of Olney*, 262 U. S. 352, 43 S. Ct. 559, 67 L. Ed. 1021 (1923). And see *Roe* v. *Kansas ex rel. Smith*, 278 U. S. 191, 49 S. Ct. 160, 73 L. Ed. 259 (1929). Appellee respectfully submits, therefore, that this court would not intrude upon the province of the New Jersey Courts as to Questions 3, 7, 9, 10, and 11. Similarly this court should not pass on federal questions *discussed* in the opinion below, where it appears that the judgment rests upon adequate State grounds. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 76 S. Ct. 824, 100 L. Ed. 1188 (1956); *Herb.* v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789 (1945); *Williams* v. *Kaiser*, 323 U. S. 47, 65 S. Ct. 363, 89 L. Ed. 398 (1945).

IV.

The federal questions, if any, were not properly or timely raised below.

It is well settled that where a party has not raised the federal question prior to a final determination by the State court of highest jurisdiction, he may not raise it in this court. That a party may raise such question in an applica-

tion for rehearing in such state court, as appellant attempted in this instance and which application was denied without opinion, is not sufficient. *Bowe* v. *Scott*, 233 U. S. 658, 34 S. Ct. 769, 58 L. Ed. 1141 (1914).

Conclusion.

Appellee respectfully urges that no substantial federal question was raised by appellant, that the attempt by appellant to raise such a question in his petition for rehearing below was not timely, that appellant failed properly in his attempt to raise such question at various stages below before the final judgment by the New Jersey Supreme Court in that he did not refer specifically to the United States Constitution, and finally that the judgment below rests on an adequate non-federal basis. For the foregoing reasons, appellee respectfully prays this court to dismiss the appeal.

If Appellant is deemed to have petitioned for a Writ of Certiorari, appellee respectfully urges this court to deny the same, based upon the foregoing in that the federal questions raised, if in fact they *were* raised, were previously decided by this court.

Prayer for Relief Under 28 U. S. C. A., Sec. 2103

Appellee prays this court to award it reasonable damages and double costs as permitted under 28 U. S. C. A., Sec. 2103, on the ground that the within appeal is wholly without merit, is frivolous, capricious and irresponsible and is designed to delay and harass appellee.

In support of this application appellee invites the attention of the court to the wholly inadequate brief filed by appellant. He has presented 11 questions for the consideration of this court, of which numbers 3, 7, 9, 10, and 11 are exclusively State questions as to which he did not even attempt to show any federal applicability. Questions 1, 2 and 6 are repetitive of one another and are vague, indefinite, and over-general. Questions 4, 5, and 8 were so frequently and conclusively decided previously by this court as to constitute a flagrant imposition upon this court and upon appellee as well.

If appellant made a study of the authorities in preparation of his Statement as to Jurisdiction, the product does not so indicate. Of the twelve cases listed as those cited at page 2 of his index, nine are included in the quoted excerpt from Mr. Justice Heher's opinion for the New Jersey Supreme Court below (Appellant's Statement, etc., p. 7) and are not elsewhere cited independently by appellant. A tenth case is that of the lower court opinions of the case at bar. The last two are New Jersey decisions, to wit, *Jamonneau* v. *Local Gov. Bd.*, 6 N. J. 281 (1951) and *City of Newark* v. *N. J. Turnpike Authority*, 7 N. J. 377, (1951), App. Dis. 342 U. S. 874. Both of these cases are cited for propositions wholly apart from the so-called federal questions raised by appellant.

It is significant that appellant has not cited *one* case of this court or indeed of any other court supporting his various and ill defined applications.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Appellee.

By BERNARD HELLRING,
Special Counsel.

PHILIP LINDEMAN II,
On the Brief.